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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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No. 540

W. M. COX,

Appellant,

vs.

JAMES S. PETERS AND MRS. IRIS BLITCH

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT AS TO JURISDICTION

MORRIS ABRAM,
W. S. ALLEN,
HAMILTON DOUGLAS, JR.,
MYER GOLDBERG,
JOHN E. GRIFFIN,
C. BAXTER JONES, JR.,
JAMES A. MACKAY,
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SUPREME COURT OF GEORGIA

Case No. 17626

W. M. COX,

Plaintiff in Error,

vs.

JAMES S. PETERS AND MRS. IRIS BLITCH,

Defendants in Error

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff in error-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Georgia entered in this cause.

As hereinafter used, "plaintiff" refers to W. M. Cox, the plaintiff in the trial court, the plaintiff in error in the Supreme Court of Georgia, and the appellant in the Supreme Court of the United States; "defendants" refers to James S. Peters and Mrs. Iris Blitch, the defendants in the trial court, the defendants in error in the Supreme Court of Georgia, and the appellees in the Supreme Court of the United States.

Statutory Provision for Jurisdiction

Jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Georgia by direct appeal is conferred by Title 28 U.S.C., 1257(2) and 2101(e).

Exhibits Attached

Exhibit A attached hereto is a copy of the judgment of the Supreme Court of Georgia from which this appeal is taken. Said judgment of the Supreme Court of Georgia is reported at 208 Ga. 498 (67 S.E. 2d 579).

Exhibit B attached hereto is a copy of the Georgia statute of which the validity is involved. Said statute is Section 34-3212 of the Georgia Code of 1933, as amended and republished by an Act of the General Assembly of Georgia approved February 7, 1950, published beginning at page 79 of the 1950 Georgia Laws.

Exhibit C attached hereto is an extract from an opinion of the United States Fifth Circuit Court of Appeals, summarizing some of the Georgia statutes regulating the 1944 Democratic Primary, and concluding that the State of Georgia has adopted the primary as an integral part of its election machinery, *Chapman et al.* v. *King*, 154 F. 2d 460, 463-4, *cert. den.* 327 U. S. 800.

Exhibit D attached hereto contains extracts from the Georgia statutes which regulated the 1950 Democratic Primary to nominate a candidate for Governor of Georgia, all of said statutes forming part of Title 34 of the Georgia Code of 1933 and of the Georgia Code Annotated.

Dates of Judgment and Appeal

Said judgment of the Supreme Court of Georgia was entered on November 13, 1951. This petition for appeal is presented to the Chief Justice of the Supreme Court of Georgia on December 21, 1951.

Rulings of the Court

In this case the Supreme Court of Georgia ruled without qualification that plaintiff had no action at law for damages

against defendants for discriminating against him in the 1950 primary of the Democratic party to nominate a candidate for Governor of Georgia; *the ruling was based on the sole ground that "the right to participate in such a primary does not come within the protection of the Fourteenth and Fifteenth Amendments to the Federal Constitution."*

The Supreme Court of Georgia recognized and stated that "the construction of certain provisions of the Federal and State Constitutions is involved," and that "the constitutionality of a statute of this state is drawn in question." The provisions of the Federal Constitution of which the construction was involved are the provisions of the Fourteenth Amendment forbidding a State to deny to any person the "equal protection of the laws" and of the Fifteenth Amendment forbidding a state to abridge the right to vote "on account of race (or) color." The Georgia statute of which the constitutionality was drawn in question was the statute requiring election officials in state-wide primaries in Georgia to count votes under the "county unit system" which is defined in the petition of the plaintiff as "the system of counting the whole vote of a county for the candidate who received a plurality of the popular votes in that county, and then distributing 410 unit votes among the 159 counties of Georgia by allotting 6 each to the 8 most populous counties, 4 each to the 30 next most populous counties, and 2 each to the 121 remaining counties." A copy of said statute is attached hereto as Exhibit B. The statute effects the apportionment of unit votes just described by doubling the representation in the Lower House which is established by Article III, Section III, Paragraph I, of the Georgia Constitution of 1945.

The Supreme Court of Georgia decided in favor of the validity of the Georgia statute requiring election officials to count votes under the county unit system in the 1950 Georgia

Democratic Primary, because the court decided in effect that *no* Georgia state action relating to *any* Georgia state primary could possibly be invalid—inasmuch as "such a primary does not come within the protection of the Fourteenth and Fifteenth Amendments to the Federal Constitution."

Nature of the Case

The case originated in the Superior Court of Meriwether County, Georgia, where plaintiff filed his petition against defendants. Thereafter the court allowed and plaintiff filed an amendment to his petition. Defendants filed general demurrers to the petition and made general objections to the amendment. The court sustained the demurrers and the objections and dismissed the petition of plaintiff.

The case was then taken by plaintiff by direct exceptions to the highest court in the state, the Supreme Court of Georgia, which rendered its final judgment and decree affirming the trial court's judgment sustaining the defendants' demurrers and objections and dismissing the petition of plaintiff.

The amended petition, of which the allegations of fact are taken as true on demurrer, alleges that in the 1950 Democratic primary to nominate a candidate for Governor of Georgia, plaintiff was a qualified voter residing in Cherokee County, and that he did in fact vote for one M. E. Thompson by striking from the ballot the names of Herman Talmadge and all other candidates except the name of M. E. Thompson.

The petition alleges that the defendants as election officials applied the Georgia county unit statute pursuant to its terms, with the following two effects: (1) they devalued, or in other words discounted, the vote of the plaintiff in relation to the average voter in the state and in relations of more extreme degree to voters in certain named counties; (2) they

actually reversed, or in other words miscounted, the vote of the plaintiff because they counted it for Talmadge whereas he voted for Thompson. The petition sets out in detail how the Georgia statute imposing the county unit system had the foregoing two effects through the actions of the defendants on the vote of the plaintiff.

In connection with the fact that the county unit system is by law applicable to the primary instead of to the election, the petition contains numerous allegations to the effect that in Georgia the Democratic primary is an integrated primary —that is, it is made by law an integral part of the machinery of the election and it plays in fact an integral part in the result of the election.

The petition alleges that the Georgia county unit statute is null and void because it deprives the plaintiff of the protection secured to him by the Federal Constitution in two particulars, as follows: (1) the protection of the Fourteenth Amendment forbidding a state to deny to him the "equal protection of the laws," because his vote was not only devalued in relation to other members of the same electorate voting for the same office, but also was in fact actually reversed and counted for a candidate against whom he voted; (2) the protection of the Fifteenth Amendment forbidding a state to deny or abridge his right to vote on account of race or color, inasmuch as the county unit system is a scheme by the defendants and others to favor certain persons in the Georgia counties of predominantly Negro population and therefore to discriminate against plaintiff and others in counties of predominantly White population "on account of their race and color—in other words, because they are White!"

The petition quotes R. S. 1979, 8 U.S.C.A., Section 43, giving an action at law to one who is deprived of rights secured by the Constitution under color of a statute of a

state. The petition specifically alleges that the defendants deprived the plaintiff of the aforesaid rights protected by the Fourteenth and Fifteenth Amendments to the Federal Constitution "under color of" the Georgia county unit statute.

Based on the foregoing official status and acts of the defendants, and on the foregoing status as a voter of the plaintiff, the action then claims compensatory damages of $100 and punitive damages of $100,000, expressly alleging that all of the actions of the defendants were both wilful and malicious.

Federal Questions—Why Substantial

The Supreme Court of Georgia ruled that defendants, who were election officials in the 1950 Democratic primary to nominate a candidate for Governor of Georgia, were not liable to plaintiff for devaluing and reversing his vote, and for abridging his vote on account of his race and color, for the sole reason that "such a primary does not come within the protection of the Fourteenth and Fifteenth Amendments to the Federal Constitution."

That ruling presents four substantial federal questions as follows:

(1) Do the Fourteenth and Fifteenth amendments to the Federal Constitution secure any protection of any kind to any person with respect to voting in the Democratic primary to nominate a candidate for Governor of Georgia?

The Supreme Court of Georgia ruled point-blank in the negative and thereby removed all federal protection from Georgia primaries. That ruling is obviously not correct. It is in direct conflict with several decisions of the Supreme Court of the United States which have established that the Federal Constitution, to the extent that it secures protection of the right to vote in an election, secures the same protec-

tion in an integrated primary—that is, a primary which is made by law an integral part of the election machinery, or which plays in fact an integral part in the election result, *Nixon* v. *Herndon*, 273 U.S. 539; *Nixon* v. *Condon*, 286 U.S. 73; *U. S.* v. *Classic*, 313 U.S. 299; *Smith* v. *Allwright*, 321 U.S. 649.

The Georgia Democratic primary has been held specifically to fall within the foregoing line of decisions. After summarizing several Georgia statutes regulating the conduct of primaries, the United States Fifth Circuit Court of Appeals ruled: "We think these provisions show that the state, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery." *Chapman et al.* v. *King*, 154 F. 2d 460, 464; *cert. den.* 327 U.S. 800.

In the case at bar the Supreme Court of Georgia sought to distinguish the foregoing federal cases on grounds which will not bear reasonable examination. The court suggested three such grounds as follows:

First, the court argued that Georgia laws which regulate primaries do not vest rights in individuals to vote in primaries, because the only laws vesting rights to vote are those dealing with general elections. One defect in that argument is that it is incorrect in fact, because Georgia laws expressly provide as to the list of registered voters that "each person whose name is on said list for the general election shall be entitled to vote in . . . all primaries . . . ," and as to the supplemental registration list that "any person whose name appears upon said list may vote . . . at any primary. . . ." Ga. Laws 1949, 1204, 1220; Ga. Code Ann., §§ 34-129, 130. The fundamental defect in that argument is that the federal constitution will not allow a state to discriminate by denying its own identity. A state is one per-

sonality and it may not evade the great commands of the federal constitution by pretending schizophrenia. If a state with its *right* hand enacts laws vesting in all of the members of a class the right to participate in an election, the same state may not with its *left* hand enact other laws arbitrarily divesting from some of the members of that class some or all of the right to participate in an integral part of that election. So long as a state's electoral process includes an integrated primary, the state may not by discrimination in such primary take away the substance from what it has given as a matter of form in the election.

Second, the court argued that in Georgia if any primary is an integral part of the election machinery it is not so *by law* but rather by will of whatever political party chooses to hold it—because in Georgia primaries are not required or financed by the state. One defect in that argument is that it was set at naught by *Chapman et al.* v. *King, supra.* The fundamental defect in that argument is that the federal constitution forbids a state to discriminate by *any* kind of law. It is not necessary that the law be unconditional or initiative; it is sufficient that the law be conditional or adoptive or delegative. Georgia laws regulating primaries represent all three of the kinds last named: (1) conditional, because the county unit statute, though not requiring or supporting primaries, *does require discrimination* upon condition that a primary is held, or in other words "whenever any political party shall hold primary elections" (see Exhibit B); (2) adoptive, because many statutes regulate not *whether* but *how* primaries shall be held (see Exhibit D), and thus the state "adopts the primary as part of the public election machinery" (see Exhibit C); (3) delegative, so far at least as the Democratic primary is concerned, because that primary is a traditional and important part of the process for determining the election of the public as to men and issues, and statutes delegating to party authorities

the power to regulate such a primary delegate the inherent power of the state over an integral part of the public election machinery (see Exhibit D, especially Georgia Code Sections 34-3209, 3210).

Third, the court argued that in Georgia nomination by the Democratic party is not "equivalent to election" for the following three reasons: (1) no nominee of any party can actually take office until elected; (2) no nominee of any party is certain to be elected, and (3) nominees may be placed on the ballot by other parties or petitioning groups. One defect in that argument is that those reasons were set at naught by *Chapman et al.* v. *King, supra.* The fundamental defect in that argument is that the federal constitution protects primaries which are *not* "equivalent to election." In Georgia or any other state "where the primary is by law made an integral part of the election machinery", the right to participate is protected whether the primary "invariably, sometimes or never determines the ultimate choice of the representative," *U. S.* v. *Classic, supra,* p. 318.

We submit that it is impossible to read the Georgia laws regulating primaries which are summarized in Exhibit D attached hereto, without concluding that the primary is by law made an integral part of the election machinery.

The Georgia Democratic primary is integrated into the election process for another reason that may be stated without discussion because the reasons hitherto discussed are sufficient. This second reason is that, whether or not the Democratic primary is integrated "by law" or is "equivalent to election," the knowledge of this court and the direct allegations of the petition in paragraphs 41, 42, 62 and 63 make it clear that "the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may

thus operate to deprive the voter of his constitutional right of choice," *U. S.* v. *Classic, supra,* p. 319.

The substantial nature of the federal question involved becomes obvious upon considering the consequences that would follow for the nation if the ruling of the Supreme Court of Georgia were correct.

If that ruling were correct, any state could discriminate in its primaries in the wildest ways imaginable. It could exclude Negroes because they are Negroes, Chinese because Chinese, Catholics because Catholics, Jews because Jews, blonds because blonds, brunettes because brunettes, A.F.L. members because A.F.L. members, C.I.O. members because C.I.O. members, ministers because ministers, teachers because teachers, lawyers because lawyers, doctors because doctors, bankers because bankers, farmers because farmers, intelligent people because intelligent, and learned people because learned. It could exclude all votes in one county, or ten counties, or fifty counties.

If that ruling were correct, the Nineteenth Amendment would have no more basis for application to primaries than the Fifteenth, and therefore any state could exclude women from its primaries.

If that ruling were correct, it would not avail to argue that Georgia statutes relating to primaries are unusual, so that opening the door to discrimination in Georgia will open no doors in other states. *If there is any trick which Georgia uses in wording its statutes relating to primaries, any other state could copy the trick and thereby remove all federal protection from its own primaries.*

Until corrected, this decision by the highest court of a state will confuse and mislead court and counsel throughout the land. We submit that the proper time and method for correcting such a decision is on appeal.

(2) Is discrimination lawful if it makes the counting of a vote depend on the candidate selected by the elector?

The statute imposing the Georgia county unit system provides that in a state-wide primary the candidate who receives the "highest number of votes in any given county . . . shall be entitled to the full vote of such county. . . ." Such language may sound innocent upon first reading, but its correct translation is as follows: "In each county, only votes for the favorite candidate will be counted as cast; all other votes will be reversed."

The Georgia county unit system, operating within a single state-wide electorate voting for a single state-wide office, *reverses* the votes of many electors *before* the canvassing of the results of the election, and such reversal depends altogether on what candidates were selected by such electors.

In other words, the statute imposing the Georgia county unit system affirmatively requires a miscounting of votes. The Supreme Court of the United States has specifically held that the miscounting of votes is unlawful, *U. S.* v. *Mosley*, 238 U. S. 383.

Such miscounting, or reversal, has nothing to do with cases relating to the creation of political entities, such as Congressional Districts in *Wood* v. *Broom*, 287 U. S. 1, and *Colegrove* v. *Green*, 328 U. S. 549, or such as a new political party in *MacDougall* v. *Green*, 335 U. S. 281. In all three of the cited cases, within the electorate voting for a single office, each vote was counted for the candidate selected by the elector. Within each Congressional district, no vote was reversed, but instead all were counted as cast and the results were then canvassed. Within the group of those petitioning to form a new political party, no question of reversal was possible because the petition itself included the selection of the nominee.

(3) Is discrimination lawful if it makes the counting of votes depend on the residence selected by the elector?

Judicial notice will reveal that the Georgia county unit system necessarily devalues votes according to residence.

Take three population figures from the 1950 census: Fulton County 466,172, State of Georgia 3,418,120, Echols County 2,495. Fulton County has six unit votes, the State of Georgia total is 410 unit votes, and Echols County has two unit votes. That means that in Fulton County it takes about 77,700 residents to receive one unit vote, in the State of Georgia as a whole it takes about 8,300 residents to receive one unit vote, and in Echols County it takes about 1,300 residents to receive one unit vote. It is a fair and uncontradicted presumption that a rough similarity in individual voting qualifications prevails throughout the state. On that presumption, and without the necessity of inquiring in detail how many votes were actually cast, it is apparent that one vote in Echols County will have about 6 times the value of one average vote in the State and about 60 times the value of one vote in Fulton County, and that one average vote in the State will have about nine times the value of one vote in Fulton County.

Actually, inasmuch as voting is frequently heavier in urban counties, the discrimination is worse than population figures would indicate. The reason is that the county unit system has this peculiar vice: the more the *actual* votes cast in Fulton County, or Chatham or DeKalb or Bibb or Muscogee or Richmond or any other county, the *worse* the discrimination becomes against the voters of that county. It was this same evil which was struck down in *Gates* v. *Long (Tennessee)* 113 S. W. 2d 388, with the language: "Discrimination against the citizens of a particular county cannot be sustained on the bare ground that they took a large part in a primary election."

In other words, the statute imposing the Georgia county unit system necessarily results in a discounting of votes. The Supreme Court of the United States has specifically held that the discounting of votes is illegal, *U. S.* v. *Saylor*, 322 U. S. 385.

Such discounting has nothing to do with cases which compare the values of votes among members of different electorates voting for different offices. A voter in one Congressional District may suffer in comparison with voters in another Congressional District, but he and they are voting for different offices, and his vote and theirs are not comparable so as to produce a "discounting" as between them, *Wood* v. *Broom*, *supra*; *Colegrove* v. *Green*, *supra*.

Such discounting also has nothing to do with cases relating to diffusion of political initiative as a condition to the existence of an electorate. To require that the signers of a petition come from diverse places in order to have existence as a new political party, is certainly not to allot different values to signatures within that electorate so as to produce a "discounting" as between them, because once the electorate is formed then every signature within it has equal value, *MacDougall* v. *Green*, *supra*.

(4) Is discrimination lawful if it abridges a vote on account of the White race or color of the elector?

We submit that the answer is too obvious to require argument. Discrimination on account of race or color is unlawful, whether the race or color be White, Black, Red or Yellow.

It may appear strange that the Georgia county unit system has been alleged to discriminate on account of White race or color. We submit that the petition amply spells out the technique by which that is done, and the allegations of the petition that such discrimination was committed by intent on that account are taken as admitted on demurrer.

More specifically, to put the proposition in simple political terms, the county unit system is alleged to be the instrument of a ruling clique of small middle-Georgia counties with predominantly Negro populations. This instrument is alleged to be used against the White voters elsewhere in Georgia, in north and south and urban Georgia

in general. Within the small group of predominantly Negro counties, some may contend that the minority of Whites in those counties use extra-legal methods to keep the Negroes from the polls, with the result that this instrument which discriminates against the Whites in other counties is used not by Negroes but rather by the minority of Whites in Negro counties. But the Federal Constitution prohibits discrimination on account of race or color, whether such discrimination is practiced by persons of the same or a different race or color.

In areas other than Cherokee County, it may very well be that the county unit system discriminates against *Negro* voters on account of *their* race and color. It is certainly possible for a clever scheme to discriminate against one race in one place and against another in another. But at present the plaintiff is concerned only with what is done to him, without involving what may be done to others.

Federal Questions: How Raised

The federal questions were expressly raised as soon as possible, namely, in the petition and amendment themselves.

In Paragraph 45 the petition alleges that "the aforesaid actions by the defendants deprived the plaintiff of the 'equal protection of the laws' contrary to Section 1, of Amendment 14 to the Constitution of the United States."

Paragraph 46 of the petition alleges that "the aforesaid actions by the defendants both denied and abridged the plaintiff's right to vote on account of his race and color, contrary to Amendment 15 to the Constitution of the United States."

Paragraph 47 specifically pleads R. S. Section 1979, 8 U. S. C. A. Sec. 43, as the basis for an action for damages for "the deprivation of any rights, privileges, or immunities secured by the constitution and laws," when committed

"under color of any statute . . . of any state . . . ," and paragraphs 48 and 49 of the petition expressly allege that the deprivations of the constitutional rights of the plaintiff were committed "under color of" the Georgia statute imposing the county unit system.

In Paragraph 60 of the petition, "The plaintiff further shows that insofar as he sues under the 'equal protection' clause of the Fourteenth Amendment to the Constitution of the United States, he does not contend that his *right to vote* for Governor of Georgia, whether in a general election or in a primary election, arises under the laws of the United States. . . . Nevertheless, plaintiff contends and alleges that . . . the 'equal protection' clause of the Fourteenth Amendment to the Constitution of the United States required that plaintiff's vote be counted with force and effect equal to every other member of that electorate! It is not plaintiff's right to vote, but his *right to equal protection thereof*, which arises under the Federal Constitution, and on which plaintiff sues in part in this action. Plaintiff contends and alleges that so much of the county unit statute as creates counties as units instead of ballots as units, and as recognizes the conception of a 'county unit' at all is unconstitutional and absolutely void. Plaintiff further contends that so much of the county unit statute as devalues the vote of plaintiff and of all other voters similarly situated by relating votes to membership in the House of Representatives so as to give the value of plaintiff's vote less than that of other votes in this state, is void."

The federal questions which were raised by the foregoing quoted language were the foundation of the plaintiff's cause of action so far as this appeal is concerned; the defendants' demurrers necessarily involved each and every one of those questions by contending that the amended petition stated no cause of action on any theory whatever; and of course

the trial court and the Supreme Court of Georgia necessarily ruled on each and every one of those questions by ruling that the amended petition stated no cause of action on any theory whatever.

The Two Previous County Unit Cases

Two previous appeals have been taken to the Supreme Court of the United States, each from a three-judge federal district court, each involving the Georgia county unit system. Neither one has any relevance in the case at bar.

In the first place, the effect of the Georgia county unit system in *reversing votes* was not raised in either of those cases, whereas it is directly involved in the case at bar.

In the second place, neither of those two cases was decided on its merits. *Turman* v. *Duckworth et al.*, 329 U. S. 675, was the first of those cases; it was dismissed as moot. *South* v. *Peters et al.*, 339 U. S. 276, was the other of those cases; it was affirmed on the sole ground that it was traditional for a federal court not to exercise its equity powers in matters of that kind.

Of course the case at bar is an action at law for damages, in which the petition expressly states that "plaintiff files this suit at law and not in equity". The difference in the attitude of the Supreme Court of the United States toward an action at law as opposed to a bill in equity involving political matters, is set forth in *Lane* v. *Wilson*, 307 U. S. 268.

The right to bring an action at law for damages because of injury to the right to vote in a primary was established in 1926 in the parent case in the field in the following language: "The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private

damage may be caused by such political action and may be recovered for in a suit at law, hardly has been doubted for over two hundred years . . ." *Nixon* v. *Herndon, supra.*

Impertinent Comparisons

Comparisons which are not pertinent are sometimes made between the Georgia county unit system and other political apportionments.

One such comparison relates to legislative apportionment, whether in the Federal Congress or in state legislatures. The difference is that discrimination under the county unit system involves comparison between electors in the same electorate voting for the same office, whereas discrimination under a legislative apportionment requires comparison between electors in different electorates voting for different offices. The county unit system operates between individuals wholly within one political entity; matters of legislative apportionment go to the political question of creating political entities. Decisions in one field are not and will not be authority for decisions in the other.

A second comparison relates to the federal electoral college. There are three important differences: (1) the discriminations within the county unit system are far more extreme; (2) states are sovereign and electors in different states are members of different electorates, but counties are not sovereign and electors in different counties voting for Governor are members of the same electorate voting for the same office; (3) the fundamental distinction is that the same federal constitution which expressly creates the electoral college expressly forbids a state to discriminate in the manner attempted by the county unit system. The fact that the federal constitution came by way of compromise to allow the federal government to do certain things, may not be taken as implied permission for states to override

express constitutional limitations by doing the same things. The federal government may declare war and print money; not so the states. The federal government may devalue and reverse votes if that is the effect of the electoral college; not so the states.

We therefore submit that the judgment of the Supreme Court of Georgia presents numerous federal questions which are substantial in nature, and that this appeal is clearly within the jurisdiction of the Supreme Court of the United States.

Respectfully submitted,

MORRIS ABRAM,
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HAMILTON DOUGLAS, JR.,
MYER GOLDBERG,
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EXHIBIT "A"

Supreme Court of Georgia.
Case No. 17626. Cox v. Peters et al.

Decided November 13, 1951

By the Court:

A party primary held under the provisions of Code § 34-3212 merely choses candidates or nominees of a political party to be submitted to the entire electorate in the general election, and is not an "*election*" within the meaning of that term as used in the statutory and constitutional provisions of Georgia conferring upon its citizens the right to vote in an election, and the right to participate in such a primary does not come within the protection of the Fourteenth and Fifteenth Amendments to the Federal Constitution.

W. M. Cox filed his petition against James S. Peters and Mrs. Iris Blitch, wherein he alleged that at the time of the 1950 Democratic primary in Georgia he was a citizen of the State of Georgia and of the United States, not laboring under any of the disabilities named in article 2 of the Constitution of Georgia, and possessing the qualifications provided by that article of the Constitution, and was a resident of Cherokee County, Georgia, duly qualified to register and vote, and that he did vote in that primary for a candidate for the nomination for Governor, namely, M. E. Thompson; that the defendant Peters held the official position of Chairman, and the defendant Blitch held the official position of Secretary, of the State Executive Committee of the Democratic Party in Georgia, and that in the 1950 primary, acting in said official positions, the defendants applied the county unit system, as defined by Code § 34-3212, in certifying the results of the primary, as required by Ga. L. 1949, p. 967 § 3 (Code, Ann. Supp., § 34-3218.3). It is alleged that the vote in Cherokee County for the nomination for Governor was 1830 votes for Herman Talmadge, and 1537 votes for M. E. Thompson; that the defendants owed

to the plaintiff a duty to count his vote for the candidate for whom it was cast at its full value, but that the defendants, by applying the county unit system in certifying the results of the election, allotted to each vote in Georgia at large 1.2 times the value of one vote in Cherokee county, and a different or greater value in various other counties, and that by applying the county unit system to the vote in Cherokee County, the defendants did not count any part of the unit vote of that county in favor of Thompson, the candidate for whom the plaintiff voted, but instead counted the whole vote of Cherokee County in favor of Talmadge, thereby reversing the vote of the plaintiff and of every other voter in Cherokee County who voted for Thompson, and there is set out in the petition the mathematical calculation by which these conclusions are reached. It is also alleged that by applying the county unit system in certifying the returns of the election, the defendants discriminated against the plaintiff as a white voter by allotting to each negro vote in certain counties a greater portion of a unit vote than to the plaintiff or to the average voter in Georgia.

It is alleged that the defendants have thus denied and abridged the plaintiff's right to vote and deprived him of the "equal protection of the laws," contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States (Code § 1-815), and has denied and abridged the plaintiff's right to vote on account of his race and color, contrary to the Fifteenth Amendment to the Constitution of the United States. Code § 1-820.

It is further alleged that these acts of the defendants were done "under color of" the State's county unit statute, in violation of R. S. § 1979, 8 U. S. C. A., § 43, which provides that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It is further alleged that the actions of the defendants in applying the county unit system were illegal, and have damaged the plaintiff by failing to protect him in the "full enjoyment of the rights, privileges and immunities" due to citizens of this State, as required by paragraph 25, section 1, article 1, of the Constitution of Georgia (Code, Ann., § 2-125), in that he has been deprived:

(1) Of his right to vote at all elections in this State under paragraph 4, section 1, article 2 of the Constitution of Georgia (Code, Ann., § 2-704);

(2) Of his right to vote at "all elections by the people" under paragraph 2, section 1, article 2 of the Constitution of Georgia (Code, Ann., § 2-702);

(3) Of the right to "originate" his government under paragraph 1, section 1, article 1 of the Constitution of Georgia (Code, Ann., § 2-101);

(4) Of his right "to regulate" his government under paragraph 2, section 5, article 1 of the Constitution of Georgia (Code, Ann., § 2-502), which allegation evidently intended to refer to the preceding paragraph of the Constitution;

(5) Of his right to elect "by ballot" under paragraph 1, section 1, article 2 of the Constitution of Georgia (Code, Ann., § 2-701).

It is further alleged that the county unit statute violates article 1, section 4, paragraph 1 of the Constitution (Code, Ann., § 2-401) which provides against varying a general law by special legislation, and article 2, section 1, paragraphs 8 and 9, of the Constitution of 1877 (Code §§ 2-608, 2-609), relating to qualifications to vote in a primary of a political party (both of which latter provisions are stricken from the Constitution of 1945), and that in applying the county unit system, the defendants treated each county as a sovereign unit for the purpose of counting its vote, contrary to the provisions declaring counties to be merely "political subdivisions," including paragraph 2, section 7, article 7 of the Constitution of Georgia (Code, Ann., § 2-6002).

An amendment to the petition was offered and allowed, subject to demurrer and objection, which amplified the al-

legations of the original petition as to the constitutional provisions alleged to be violated by the defendants in the application of the county unit system.

The plaintiff alleges that by reason of the application of the county unit system his vote has been devalued and reversed, as alleged in the petition; that he has been deprived of the right to vote in the primary, and to have his vote counted at its full value for the candidate for whom it was cast, and seeks to recover damages for the alleged deprivation of these rights.

The amendment to the petition was stricken on objection by counsel for the defendants, and a general demurrer to the petition sustained, and to these judgments the plaintiff excepts.

Hawkins, Justice. (After stating the foregoing facts.) If we should endeavor to follow out the labyrinthine paths taken by the arguments of able counsel for the respective parties, both orally and by brief, and should take up and discuss the various philosophies of government presented thereby, together with the arguments predicated thereon, and the many authorities cited in the exhaustive briefs, and if it were necessary to discuss in detail the history, and the merits and demerits of the county unit system, it would not be surprising if the court should lose sight of the fact that what we have presented is simply a suit for damages, of which this court has jurisdiction because the construction of certain provisions of the Federal and State Constitutions is involved, and because the constitutionality of a statute of this State is drawn in question. Article 6, Section 2, Paragraph 4 of the Constitution of Georgia (Code, Ann., § 2-3704). The plaintiff alleges that he has been damaged, and is seeking to recover money damages from the defendants because they, as Chairman and Secretary, respectively, of the Democratic Executive Committee of Georgia, in the performance of their official duties, made a certain certificate as to who was the nominee of the Democratic party for Governor of the State of Georgia in the Democratic Primary of 1950, whereby plaintiff's vote was diluted, devalued and reversed, because the certification was made upon the county unit basis under the provisions of Code § 34-3212,

commonly referred to as the Neill primary law. Counsel for the plaintiff very frankly stated in their brief that "Essentially all of the different constitutional violations alleged are aimed at one point—to invalidate the county unit statute and therefore the county unit system," it being the contention of the plaintiff that if this statute be invalid for any one or more of the reasons alleged, the conduct of the defendants was to him a single wrong on which he is entitled to bring a single suit.

The right to vote for Governor in a Democratic primary does not arise under the Constitution or laws of the United States. See in this connection, Minor v. Happersett, 88 U. S. 162 (21 Wall. 162, 22 L. ed. 627); Ex parte Yarbrough, 110 U. S. 651 (4 Sup. Ct. 152, 28 L. Ed. 274); McPherson v. Blacker, 146 U. S. 1 (13 Sup. Ct. 3, 36 L. ed. 869); Guinn v. United States, 238 U. S. 347 (35 Sup. Ct. 926, 59 L. Ed. 1340); Breedlove v. Suttles, 302 U. S. 277 (58 Sup. Ct. 205, 82 L. ed. 252); Snowden v. Hughes (321 U. S. 1 (64 Sup. Ct. 397, 88 L. ed. 497).

It is contended by the plaintiff, however, that the right to vote in such a primary does arise under the Constitution and laws of the State of Georgia, and that the equal protection clause of the Fourteenth Amendment to the Federal Constitution protects him in this right.

It is thus apparent that the main and controlling question in this case is whether or not the provisions of the Constitution of the State of Georgia set out in the foregoing statement of facts, and the provisions of Code §§ 79-205 and 79-206 have application to a party primary in Georgia held for the purpose of nominating candidates of that party to run in the general election.

By reference to the provisions of the Constitution referred to in the statement of facts, which the plaintiff contends confer upon him the right to vote in the primary, it will be seen that in each and every instance the reference to the right to vote is in "*elections* in said State," "*elections* by the people," "all *elections* in said State," "*elections* by the people shall be by ballot," and the Code sections referred to confer the *elective* franchise upon citizens. Not a single article, section or paragraph of the Constitu-

tion of 1945 dealing with elections makes any reference to a party primary. At the time these provisions were first placed in our Constitution, and at the time of the enactment of the Code sections above referred to, there was no such thing as a party primary in Georgia. For a history of the origin of the party primary see Turman v. Duckworth, 68 F. Supp. 744.

In 29 C. J. S. 150, § 112, it is said: "Whether primary elections are within the intent and meaning of the term 'election,' as used in constitutional and statutory provisions, often depends on the manner in which the term is used and the purpose of the provisions, and also on the factor of whether primary elections were in existence at the time the provisions were adopted or enacted." In Newberry v. United States, 256 U. S. 232 (41 Sup. Ct. 469, 65 L. ed. 913), it is said: "The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the qualified electors. Hawke v. Smith, 253 U. S. 221 (40 Sup. Ct. 495, 64 L. ed. 871). Primaries were then unknown. Moreover, they are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in constitutions or statutes are not necessarily applicable to primaries—the two things are radically different." Our own State courts have held that a party primary is not an "election" within the meaning of that term as used in our criminal statutes. In George v. State, 18 Ga. App. 753 (90 S. E. 493), it is said: "Primary elections are not within the meaning of section 660, subsection 6, of the Penal Code (1910), which provides that any person who shall deposit a ballot 'at any election' in any name other than his own, as appears on the list of registered voters prescribed by law, shall be guilty of a misdemeanor." To the same effect see Shea v. State, 46 Ga. App. 729 (169 S. E. 46). In McGill v. Simmons, 172 Ga. 127 (157 S. E. 273), it is held that the constitutional provision that "To entitle a person

to register and vote . . . he shall have resided, . . . and shall have paid all taxes which may have been required of him . . . at least six months prior to the election at which he offers to vote," refers to the general election, and not to a special election. To the same effect see Overton v. Gandy, 170 Ga. 562 (153 S. E. 520). For cases from other jurisdictions holding that general provisions touching elections in Constitutions or statutes are not necessarily applicable to party nominating primaries, but usually refer to general elections, see United States v. Gradwell, 243 U. S. 476, 487 (37 Sup. Ct. 407, 61 L. ed. 857), and cases there cited; People v. Cavanaugh, 112 Cal. 674 (44 Pac. 1057); State v. Woodruff, 68 N. J. L. 89 (52 Atl. 294); Commonwealth v. Wells, 110 Pa. St. 463 (1 Atl. 310).

It is insisted by the plaintiff, however, that the primary in Georgia is an integral part of the election machinery of the State, and for this reason comes within the protection of the constitutional provisions relied on, and he cites in support of this contention United States v. Classic, 313 U. S. 299 (61 Sup. Ct. 1031), 85 L. ed. 1368); Smith v. Allwright, 321 U. S. 649 (64 Sup. Ct. 757, 88 L. ed. 987); Nixon v. Herndon, 273 U. S. 536, (47 Sup. St. 446, 71 L. ed. 759); and Chapman v. King, 154 F. 2d, 460. With this contention we cannot agree, for the reason that in the State of Texas, where the Allwright and Nixon cases originated, the statute of that State *requires* a primary to be held, as is also true in the State of Louisiana, as pointed out in the Classic case, supra, and in the latter State the statute required the State to defray the expense of the primary. Such is not the case in Georgia, but on the contrary, the holding of a primary in this State is at the option of any political party, and is not requisite to nomination or to a place on the official ballot (South v. Peters, 89 F. Supp., 672, 677), and under Code § 34-3216, it is provided that "The expense of holding such primary elections shall be paid by the political party which causes the same to be held." It is true that in Chapman v. King, 154 F. 2d, 460, supra, the statement was made that under the Constitution and statutory provisions there referred to the primary in Georgia was made an integral part of the election machinery, but an examination of the opinion in that

case will show that this statement was predicated in part upon the provisions of article 2, section 1, paragraph 8, of the Constitution of 1877 (Code of 1933, § 2-608). This provision in the amendment of 1908 of the Constitution of 1877 was stricken and omitted from the Constitution of 1945, and an examination of the minutes of the Constitutional Commission, Volume 1, page 112, will disclose that it was purposely stricken and omitted from the present Constitution of this State so as to take the party primaries without the ruling in Smith v. Allwright, 321 U. S. 649, supra, and leave them purely party primaries. Whether this should have been done is a matter with which this court has nothing to do. It was done, and the Constitution of 1945 was adopted by the people of this State, and is binding upon this court.

It is further contended by the plaintiff that nomination in a Democratic primary in Georgia is equivalent to election, and that for this reason the primary should be held to come within the protection of the constitutional provisions relied on. While a statement to this effect will be found in the special concurrence of Chief Justice Russell in Clark v. Colquitt County Democratic Executive Committee, 158 Ga. 642 (124 S. E. 40), This was not a ruling by the court, but merely the expression of the opinion of Mr. Chief Justice Russell, and while we have the highest regard for the former Chief Justice, this statement is purely obiter, and without foundation in fact or in law. In 29 C. J. S. 14, § 1 (d) it is said: "A primary election is merely a substitute for a convention. It is not an election to office, it being distinguishable from an election of officers in that it precedes such election and is merely a choice of candidates or nominees of political parties, while an election is the final choice of the entire electorate." In South v. Peters, 89 F. Supp. 672, 677, it is said: "Democratic nomination is not however the equivalent of election nor does it insure it, for much may happen before or in the final election". The nominee of a party primary cannot take the oath, occupy, discharge the duties, or receive the emoluments of the office until his final choice by the entire electorate in the general election, and a nomination by a Democratic primary in Georgia is not the equivalent of election. The allegations of the plaintiff's petition

that only a nominee of the Democratic primary of 1950 could get his name on the ballot for the general election in that year must yield to the specific provisions of the Code, Ann. Supp., § 34-1904, providing for the placing of names of nominees of parties upon the general election ballot by compliance with the requirements of that section. "Where a petition alleges facts as true which are contradicted by legislative acts . . . such facts cannot be held to be true, and they will not prevent the sustaining of a demurrer to the petition." Bennett v. Public Service Commission of Georgia, 160 Ga. 189, 192 (127 S. E. 612).

We hold that when a political party in Georgia voluntarily elects to exercise the option of holding a Primary for the nomination of party candidates under the provisions of Code § 34-3212, such primary is not an "*election*" within the meaning of that term as used in the constitutional provisions and Code sections relied on by the plaintiff, and that the trial court did not err in sustaining the defendants' demurrer and dismissing the plaintiff's petition and the amendment thereto. Attention is called to the fact that the plaintiff's sole claim of a right to vote in the primary is predicated upon his allegation that he is a citizen of the United States and of the State of Georgia and is a registered, qualified voter. For this court to hold that, based upon these allegations alone, the plaintiff is entitled to vote in a Democratic primary, would be to destroy party primaries which have existed in Georgia for more than fifty years, and would open every primary, by whatever party held, to participation therein by every registered, qualified voter in Georgia, regardless of his party affiliation. No such drastic holding is required or authorized in this case.

Judgment affirmed. All the Justices concur.

EXHIBIT "B"

GEORGIA CODE OF 1933 § 34-3212, AS AMENDED BY AN ACT OF THE GENERAL ASSEMBLY OF GEORGIA APPROVED FEBRUARY 7, 1950, PUBLISHED BEGINNING AT PAGE 79 OF THE GEORGIA LAWS

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, as follows:

Section 1. That the certain Act entitled an Act to provide for nominations by political parties in this State of candidates for United States Senator, Governor, State House Officers, Justices of the Supreme Court, and Judges of the Court of Appeals, etc., (Acts 1917, pages 183 to 189, inclusive) approved August 14, 1917, be amended by striking the words "is hereby fixed on the second Wednesday in September of" in lines seven and eight and substituting in lieu thereof the words: "day shall be fixed by the State Executive Committee of the political party holding such primary election," so that said section as amended shall read as follows:

"Section 1. Whenever any political party in this State shall hold primary elections for nomination of candidates for United States Senator, Governor, State House Officers, Justices of the Supreme Court, and Judges of the Court of Appeals, such party or its authorities shall cause all candidates for nominations for said offices to be voted for on one and the same day throughout the State, which day shall be fixed by the State Executive Committee of the political party holding such primary election, each year in which there is a regular general election. Candidates for nominations to above named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower house of the General As-

sembly. If in any county any two or more candidates should tie for the highest number of popular votes received, then the county unit vote of such county shall be equally divided between the candidates so tying. All such county unit votes shall within ten days after such primary be accurately consolidated by the chairman and secretary of the State Committee of the political party holding such primary, and published at least one time in a newspaper published at the capital of the State, within three days after the completion of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who receive a majority of all the county unit votes, throughout the entire State, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominees of such party for the above named offices, respectively, and it shall be the duty of the State Executive Committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates are placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held as the duly nominated candidates for the offices named of such party; provided, that, in the event there are only two candidates for any particular office referred to in this section and it should appear, after the consolidation of all the county unit votes throughout the State, that each of said candidates have received an equal number of county unit votes, the one of said candidates who shall have received in said primary election a majority of the popular votes throughout the State shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for such office, and it shall be the duty of the State Executive Committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that

the name of such successful candidate is placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held as the duly nominated candidate of such party for the office named; provided, further, that if no convention of such party is called or held, the declaration of the result shall be made in such manner as may be prescribed by the State committee or other authority of such party.

EXHIBIT "C"

EXTRACT FROM THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS THROUGH JUDGE SAMUEL H. SIBLEY IN CHAPMAN ET AL. vs. KING (1946), 154 F. 2d 460, 463-4

But there are features of the Georgia laws which seem to us to show that the State, when any party calls a primary, associates itself with the party in holding it, and adopts the result as authenticating the successful candidate to be the nominee of that party for the official election ballot. The State collaborates in these ways: It prohibits anyone to participate in any primary or convention of any political party who is not a qualified voter. Georgia Code § 2-608, Constitution, Art. II, Sect. I, Par. 8. The State furnishes its list of registered voters and these voters alone are declared entitled to vote in primaries as well as in general elections. Georgia Code, § 34-405. And the State registrars are required to be at the court house during the voting hours of the primary as fixed by law, § 34-2001a, to make corrections in the list, § 34-411 (Supplement). The State requires the party to select election managers, and requires each manager to take an oath that he will fairly and impartially and honestly conduct the election according to the provisions of law. § 34-3201. If a voter is challenged, they are required to administer to him an oath that he is duly qualified to vote "according to the rules of the party, and according to the election laws of this State." § 34-3202. All the laws in reference to the qualification of voters and their

registration are applied to primaries, and "No person who is not a duly qualified and registered voter according to law and who is not also duly qualified in accordance with the rules and regulations of the party holding the same, shall be entitled to vote at any such primary election." § 34-3218. If the challenged voter swears falsely, the State will punish him. § 34-9925. No one but a sworn manager can have any part in receiving or counting the votes. § 34-3205. The managers must turn over tally sheets, lists of voters, ballots and other election papers to the Clerk of the Superior Court to be kept under seal until the next grand jury meets if no contest is filed. § 34-3207. The managers are indictable for violation of their duty. §§ 34-9922, 34-9923. Generally all penal laws touching elections are extended to primaries, § 34-9933, Supplement; and § 34-9907.

Further, by the Act of 1917, Sections 34-3212 to 34-3218, the State has undertaken to control the method of determining who has been nominated in a primary for United States Senator, Governor, Statehouse officers and Justices of the Supreme Court and Court of Appeals, these being statewide elections, by saying that neither a majority nor a plurality of all votes cast shall nominate, but that a plurality of the votes in each county shall carry that county, and a majority of "county units" carried as therein defined, shall determine the nominee; and if no candidate carried a majority of the county units and there are but two candidates the one who received a majority of the popular votes shall be the nominee; but if there are more than two candidates and neither carried a majority of the county unit votes, there shall be a second primary between the two leading candidates whose result is to be determined on the same basis; with other elaborate provisions on further contingencies. This Act appears in large measure to take such primaries out of the control of the parties initiating them, and to substitute the State's will in determining the mode of choice of the party nominee. It is this Act which specifically declares that no one may vote who is not qualified according to the rules of the party. § 34-3218.

[5, 6] We think these provisions show that the State, through the managers it requires, collaborates in the con-

duct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery.

EXHIBIT "D"

GEORGIA STATUTES WHICH REGULATED THE 1950 DEMOCRATIC PRIMARY TO NOMINATE A CANDIDATE FOR GOVERNOR

(Hyphenated references are to sections of the Georgia Code; where not prefixed by P they are found in the Georgia Code of 1933, and where prefixed by P they are found in the 1951 Pocket Supplement to Georgia Code Annotated. References to Acts are to the Georgia Laws as published by authority.)

P 34-128.- . . . the registrars shall file with the clerk of the superior court of their county the . . . list of the registered and qualified voters. . . . No person whose name does not appear on said list shall vote or be allowed to vote . . . at any party primary. . . . (Acts 1949, pp. 1204, 1219.)

P 34-129.- Each person whose name is on said list . . . shall be entitled to vote in . . . all primaries. . . . (Acts 1949, pp. 1204, 1220.)

P 34-130.- . . . The registrars shall . . . file with the clerk of the superior court a supplemental list. . . . Any person whose name appears upon said list may vote . . . at any primary. . . . (Acts 1949, pp. 1204, 1220.)

34-1902.- Whenever any . . . primary . . . is to be held, it shall be the duty of the ordinary of each county . . . to provide at each polling place, a private room or rooms, a booth or booths, or an enclosure or enclosures, . . . to accommodate the persons qualified to vote. . . . (Acts 1922, pp. 97, 98.)

34-1903.- In all primary elections, it shall be the duty of the . . . party authority of the political party . . . to provide official ballots. . . . Each ballot shall have attached at the top thereof a sheet which may be easily de-

tached, with a blank space for the name of the voter. . . . The voter or elector shall erase, mark out or cancel the name or names of the candidate or candidates for whom he does not wish to vote. . . . All candidates for nomination for State and county offices . . . shall qualify as such candidates in accordance with the rules of the party calling the primary not later than 30 days previous to the holding of such primary, . . . (Acts 1922, p. 98.)

34-1906.- The officers or party authorities furnishing to the election managers the ballots provided for in sections 34-1903 . . . shall also furnish all other election supplies required by law, . . . and it shall be unlawful for any manager or clerk or other election official to deliver any ballot or ticket to any person other than a qualified voter. . . . (Acts 1922, p. 102.)

34-1907.-No . . . person . . . other than the officials or party authorities . . . shall retain or deliver or furnish a ballot. . . . (Acts 1922, p. 102.)

P 34-1907.1.- No person . . . shall . . . possess a ballot . . . except the officials having charge of . . . primary elections. . . .

34-1908.- It shall be the duty of the ordinary to cause to be printed in large type cards of instructions. . . . (Acts 1922, p. 103.)

34-1909.- No person . . . shall in any manner . . . attempt to influence or interfere with any voter who is in said booth, room or enclosure. . . . (Acts 1922, p. 103.)

34-1911.- The ordinary shall be entitled to the sum of $3 for each election . . . out of the country treasury. . . . (Acts 1922, p. 105.)

34-1912.- It shall be the duty of the ordinary of each county, after each election, to preserve and secure for subsequent use . . . all of the . . . paraphernalia in connection therewith. . . . (Acts 1922, p. 105.)

P 34-1914.- In all primary elections, it shall be the duty of the . . . party authority of the political party . . . to provide official ballots. . . . Each ballot shall have attached at the top thereof a number strip which may be easily detached. . . . All candidates for nomination for State and county offices . . . shall qualify as such candi-

dates in accordance with the rules of the party calling the primary, not later than 30 days previous to the holding such primary. . . . (Acts 1941, p. 324.)

P 34-1915.- If the right of a person offering to vote is challenged for any legal cause . . . the election manager shall not permit the voter to remove the number strip. . . . (Acts 1941, pp. 324, 326.)

P 34-1917.- This law [§§ 34-1914 to 34-1916] shall apply . . . to all . . . primary elections. The provisions of sections 34-1902 through 34-1912, shall . . . apply . . . to all . . . primary elections. . . . (Acts 1941, pp. 324, 327; 1949, pp. 1291, 1292.)

P 34-1918.- Each voter at any and all primary elections . . . when applying to vote and before receiving a ballot and being allowed to vote, shall sign his or her name in a book to be kept by the managers . . . to be known as "voters identification book". . . . (Acts 1941, pp. 429, 430.)

P 34-1919.- Before the date fixed for any primary election . . . the . . . chairman of the party . . . shall furnish to the managers at each box at such election a book to be known as voters identification book. . . . (Acts 1941, pp. 429, 430.)

P 34-1920.- The managers at any and all primary elections . . . when making returns . . . shall file along with said returns said voters identification book. . . . (Acts 1941, pp. 429, 430.)

34-2001.- All candidates for Governor . . . shall, within 20 days from the date of holding the . . . primary election . . . file . . . an itemized statement, under oath, of all compaign expenses incurred by them. . . . (Acts 1908, p. 63.)

34-2002.- No person violating the provisions of the preceding section shall be declared the nominee of his party. (Acts 1908, pp. 63, 64.)

P 34-2003.- No candidate for nomination to any office in any primary . . . shall expend, or agree to expend, more than $25,000 in his campaign. . . . (Acts 1943, p. 441; 1945, pp. 187, 188.)

P 34-2204.- All candidates shall prepare and file . . . an itemized statement, under oath . . . of all money ex-

pended in such campaign. . . . (Acts 1943, p. 441; 1945, pp. 187, 188.)

P 34-2005.- Any person who shall wilfully, or knowingly, violate any provisions of this law [§§ 34-2003 to 34-2005] shall be subject to impeachment. . . . (Acts 1943, pp. 441, 442; 1945, pp. 187, 188.)

P 34-2001a.- The hours for holding all . . . primary elections . . . shall be from seven o'clock A. M. to six o'clock P.M. . . . (Acts 1943, pp. 480, 481.)

34-3201.- Every political primary election . . . shall be presided over and conducted in the manner and form prescribed by the rules of the political party . . . by managers selected in the manner prescribed by such rules. Such managers shall . . . each take and subscribe an oath that he "will fairly, impartially, and honestly conduct the same according to the provisions of the law providing how primary elections shall be held in this State, and in accordance with the laws of this state governing regular elections for the offices of this State." . . . (Acts 1890-1, p. 210.)

34-3202.- Before any ballots are received at such primary elections . . . the managers shall open each ballot box to be used in the election, and shall exhibit the same publicly. . . . They shall keep a list of voters voting at the election, and shall, before receiving any ballot, administer to the voter an oath. . . . At the close of the election the managers shall proceed publicly to count the votes and declare the result. They shall certify the result of the election, and transmit the certificate . . . in the manner prescribed in this Chapter. (Acts 1890-1, p. 210.)

34-3203.- Whenever any political party shall hold primary elections . . . such party or its authorities shall cause all candidates for nominations for Governor . . . to be voted for on one and the same day throughout the State at such date as may be fixed by the State executive committee of such party . . .: Provided, that said executive committee shall not fix the date for the said general primary earlier than 60 days before the date of the general State election in November. . . . (Acts 1908, p. 55.)

34-3204.- No elector shall vote in any such primary election in a militia district other than the one in which he resides. . . . (Acts 1908, pp. 55, 56.)

34-3205.- No person who has not taken the oath prescribed by law for managers of primary elections shall act as manager, clerk, or assistant. . . . (Acts 1908, pp. 55, 56.)

34-3206.- No manager of any such primary election shall receive the ballot of any elector until he has first ascertained that the name of such elector appears upon the registration list. . . . (Acts 1908, pp. 55, 56.)

34-3207.- The returns of the managers . . . shall be filed in the office of the clerk of the superior court. . . . (Acts 1890-1, p, 210; 1908, pp. 55, 56.)

34-3208. The persons authorized by the rules of the party . . . shall provide an official ballot. . . . (Acts 1908, pp. 55, 57.)

34-3209. The party authorities shall, in all matters not provided for in this Chapter, formulate rules and regulations for holding said primary election and for making returns thereof to the proper party authorities. (Acts 1908, pp. 55, 57.)

34-3210. Every such primary election shall be held at the time and place, and under the regulations prescribed by the rules of the party, . . . and the return shall be made and the result declared as prescribed in this Chapter. (Acts 1890-1, p. 210; 1900, p. 40; 1908, p. 55.)

34-3211. When a contest is filed . . . it shall be the duty of the clerk of the superior court to deliver the same . . . to the person or persons who shall preside at the taking of the testimony in such contested election, . . . (Acts 1900, pp. 40, 41.)

P 34-3212. Whenever any political party in this State shall hold a primary election for nomination of candidates for . . . Governor . . . such party or its authorities shall cause all candidates . . . to be voted for on one and the same day throughout the State, which day shall be fixed by the State Executive Committee . . . Candidates for nominations to above named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unti basis, that is to say, two votes for each representative to which such county is entitled in the lower

House of the General Assembly . . . All such county unit votes shall within 10 days after such primary be accurately consolidated by the chairman and secretary of the State Committee of the political party holding such primary, and published at least one time in a newspaper published at the Capital, within three days after the completion of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who shall receive a majority of all the county unit votes, throughout the entire State, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominees of such party for the above named offices. . . . (Acts, 1917, pp. 183, 184; 1950, pp. 79, 80.)

P 34-3213. In the event that, after such consolidation of all the county unit votes throughout the State, it shall be made to appear that in the contest for any one or more of said offices, no candidate has received a majority of all of the county unit votes throughout the State, . . . such political party shall hold a second primary election throughout the State on a day fixed by the State Executive Committee of the political party . . . and the candidate who shall receive a majority of the county unit votes . . . shall be declared . . . to be the nominee of such party . . . : Provided, that if both candidates for any office in said second primary election shall receive an equal number of county unit votes, . . . the . . . authority of such party, shall declare the candidate receiving the majority of the popular votes cast the regular nominee of such party for that particular office . . . The date shall be fixed by the Committee at least 30 days before the date on which said primary election is to be held. (Acts 1917, p. 185; 1950, pp. 79, 82.)

34-3214. In each regular election year in which a second primary shall be necessary . . . such party or its authority shall not hold its convention until after the expiration of 15 days from the date of such second primary election. (Acts 1917, p. 188.)

34-3215. Special primary elections to fill vacancies in any of the offices referred to in this law shall be held on such date as may be fixed by the State Executive committee of such party; but . . . the same duties and obligations are hereby imposed upon the chairman, secretary, convention or other party authorities in the case of such special primary elections as are in this law imposed upon them in the case of general primary elections. . . . (Acts 1917, p. 188.)

P 34-3215.1. Immediately after the consolidation of the votes in any such primary election a certificate, showing the names of such candidates and the offices for which they are candidates, shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the chairman and secretary of the State committee of the political party holding such primary. Said certificate shall show by counties the total number of popular votes and the county unit votes received by each candidate in any such primary election. (Acts 1943, p. 347.)

34-3216. The expense of holding such primary elections shall be paid by the political party. . . . (Acts 1917, p. 189.)

34-3218. All the laws in reference to the qualification of voters and their registration shall apply to said elections, and no person who is not a duly qualified and registered voter according to law and who is not also duly qualified in accordance with the rules and regulations of the party holding the same, shall be entitled to vote at any such primary election. (Acts 1917, p. 189.)

P 34-3218.1. Every party primary . . . for . . . Governors . . . shall be held at the time fixed by section 34-3212, and subject to the rules therein prescribed. Any second primary necessary under that section shall be held at the time therein fixed. (Acts 1949, p. 967.)

P 34-3218.2. Every candidate at such primary shall qualify by complying with the rules adopted by the State Executive Committee of the political party holding the primary. The State Executive Committee of such party, under such rules and regulations as it may adopt, shall determine all questions relating to the qualifications of candidates for nominations for officers to be voted for at such primary, . . .

and the decision of such executive committee with respect to any such question shall be final. (Acts 1949, p. 967.)

P 34-3218.3. When any such political party shall hold a primary, or shall nominate candidates for any office to be filled at an election by the people of the State, the chairman and secretary of the State executive committee of such party shall certify the names of the nominees of the party to the Secretary of State within the time provided by law, and such certificate shall be conclusive of the right of the nominees so certified to have their names placed on the official ballot at the general election as the nominees of such party. (Acts 1949, p. 967.)

P 34-3223. The legislative intent and purpose of this law is to effectuate fair and honest primary elections for the nomination of candidates for public office in this State. (Acts 1941, pp. 432, 433.)

P 34-3224. The provisions of this law shall apply to all primary elections . . . for the purpose of nominating candidates for Governor. . . . (Acts 1941, pp. 432, 433.)

P 34-3225. Any defeated candidate in any such primary election who received thirty-three and one-third per cent of the total vote cast . . . shall have the right to demand of the county executive committee of any such county or other authority conducting such primary election, a recount . . . (Acts 1941, pp. 432, 433.)

P 34-3226. . . . it shall be the duty of the executive committee. . . . to grant such recount. . . . (Acts 1941, pp. 432, 434.)

P 34-3227. . . . such defeated candidate. . . . and the successful candidate, shall each immediately select one representative. . . . The judge of the superior court of the judicial circuit adjoining that in which such county is located shall be the third member of the committee to conduct such recount. . . . (Acts 1941, pp. 432, 435.)

P 34-3228. . . . The same committee constituted as aforesaid to conduct said recount is hereby clothed with authority to subpœna witnesses as well as any records. . . . (Acts 1941, pp. 432, 435.)

P 34-3233. . . . the ruling of the majority of such committee on any matter arising before said committee for

determination shall be controlling and final. . . . (Acts 1941, pp. 432, 437.)

P 34-3234. . . . The report and findings of such committee on such recount shall be final, and shall be adopted, promulgated, published and certified as such by the authority of the political party under whose jurisdiction the said primary election has been held. (Acts 1941, pp. 432, 437.)

P 34-3235. Any certification of the result of such primary election which has been made by the executive committee of said county or other authority conducting said primary election . . . shall be superseded and set aside and be null and void, in the event the result of the vote in such election is changed by the action of such committee. . . . (Acts 1941, pp. 432, 438.)

P 34-3236. . . . the candidate for office whose rights may be affected by the failure or refusal of such executive committee or other authority to abide by such report of such committee shall have the right to proceed by mandamus or appropriate legal or equitable remedy in the courts of this State to enforce the report and findings of such committee conducting the recount of the ballots as herein provided. . . . (Acts 1941, pp. 432, 438.)

P 34-3301. Any voter, when required to be absent . . . may vote by registered mail. . . . (Acts 1943, p. 228.)

34-3302. Said voter shall by registered mail forward to the registrars of the county . . . a letter of application for a ballot. . . . (Acts 1924, p. 186.)

P 34-3305. The registrar . . . shall enroll the name and address of the applicant, if found eligible, in a book to be provided for the purpose, and make out the certificate and coupon attached, as hereinafter provided, and forward same to the applicant. . . . (Acts 1924, p. 187; 1941, p. 366.)

34-3307. The applicant shall open the sealed envelope marked "ballot within" in the presence of the postmaster or his assistant, who shall register the same in return. The voter shall mark and refold the ballot without assistance and . . . shall seal and sign the voucher. . . . (Acts 1924, p. 188.)

34-3310. In all primary elections, it shall be the duty of the . . . party authority of the political party . . . to

provide official ballots for all such elections . . . with the words "Absent Voter's Ballot" written thereon. . . . (Acts 1924, p. 190.)

34-3311. Upon the receipt of the return ballot from the voter, the registrars shall . . . deposit the envelope containing the ballot, unopened, in the sealed box to be provided. . . . (Acts 1924, p. 190.)

34-3312. On the day of the election the registrars shall deliver the box containing the sealed ballots . . . to the managers of the election. . . . (Acts 1924, p. 191.)

34-3313. At the close of the regular balloting the box shall be opened by the managers of the election, and the ballots deposited in the regular ballot box. . . . (Acts 1924, p. 191.)

34-9907. . . . All the provisions of this section shall be applicable, so far as the same may be, to all primary elections. The hiring of workers qualified to vote in said . . . primary before or on the day of election . . . shall be a misdemeanor. (Acts 1906, p. 46.)

34-9915. Any manager, clerk, or officer or other person upon whom a duty is imposed by Chapter 34-19, relating to elections, who intentionally and wilfully neglects or fails to perform the same . . . shall be guilty of a misdemeanor. (Acts 1922, p. 104.)

34-9917. Any person who knowingly or wilfully violates any of the provisions of section 34-1907, relating to the preparation of election ballots, shall be guilty of a misdemeanor. (Acts 1922, p. 102.)

34-9920. Whoever shall violate any of the provisions of section 34-2001, requiring the filing of statements of campaign expenses, shall be guilty of a misdemeanor. (Acts 1908, p. 63.)

34-9922. Any manager of a primary election, who shall be guilty of wilfully violating any of the duties and obligations devolving upon him as such manager, shall be punished as for a misdemeanor. (Acts 1890-1, p. 211.)

34-9923. Any manager of a primary election or clerk of the superior court, who shall violate the provisions of sections 34-3204 to 34-3209 or 34-3211, relating to primary elec-

tions, shall be guilty of a misdemeanor. (Acts 1900, p. 40; 1908, pp. 55, 57.)

34-9924. Any manager of a primary election, who shall be guilty of fraud or corruption in the management of an election, shall be punished as for a misdemeanor. (Acts 1890-1, p. 211.)

34-9925. Any voter at a primary election, who shall . . . swear falsely . . . shall be guilty of perjury and shall be punished as for perjury. (Acts 1890-1, p. 211.)

34-9926. Any person who shall either buy or sell . . . a vote in any primary election . . . shall be guilty of a misdemeanor. (Acts 1904, p. 97; 1905, p. 111.)

34-9928. Any person who shall vote at a primary election more than once or at more than one polling place, shall be guilty of a misdemeanor. (Acts 1890-1, p. 211.)

34-9931. Any public official who shall knowingly violate any of the provisions of Chapter 34-33, relating to voting by mail, . . . shall be guilty of a misdemeanor. (Acts 1924, p. 192.)

P 34-9933. All penal laws of the State of Georgia relating to illegal practices in general elections are hereby extended to all primary elections held for State, county, or municipal offices in the State of Georgia. (Acts 1939, p. 309.)

P 34-9934. Any person who at any primary election . . . shall sign the voters identification book . . . representing himself or herself to be a different person . . . shall be guilty of forgery and punished as for a misdemeanor. (Acts 1941, pp. 429, 431.)

P 34-9935. Any person or official violating any of the provisions of sections 34-3223 to 34-3236, relating to recount of primary election ballots, shall be held to be guilty of misdemeanor. . . . (Acts 1941, pp. 432, 439.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 540

W. M. COX,

Appellant.

vs.

JAMES S. PETERS AND MRS. IRIS BLITCH

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 540

W. M. COX,

Appellant,

vs.

JAMES S. PETERS AND MRS. IRIS BLITCH,

Appellees

APPEAL FROM THE SUPREME COURT OF GEORGIA

STATEMENT OF APPELLEES OF MATTERS MAKING AGAINST THE JURISDICTION OF THE UNITED STATES SUPREME COURT—MOTION TO DISMISS OR AFFIRM.

Now come the appellees, pursuant to Rule 12 of the Supreme Court of the United States, and file this their statement of matters making against the jurisdiction of the Supreme Court of the United States to review the order or decree appealed from, and, as a part thereof, their motion to dismiss or affirm, and show:

Statement of Matter Involved

Appellant, who is a white male citizen of Cherokee County, Georgia, but who does not allege that he is a Democrat, voted without protest in the State democratic primary of 1950. Months later he sued the chairman and secretary of the State Democratic Executive Committee for claimed actual and punitive damages, alleging that they wronged him by applying the "county unit rule" in ascertaining and declaring the result of the primary in the race for the democratic nomination for Governor.[1]

Appellant alleged that he voted in the primary and voted for candidate Thompson; that Talmadge, the successful candidate, got a majority of the votes cast in Cherokee County—1830 to 1537 for Thompson—and Cherokee County's two unit votes were counted by the defendants for Talmadge. He also alleged that in the State as a whole Talmadge got 287,627 popular votes to 279,137 for Thompson. He contended that the defendants by determining the result of the primary according to the County Unit System had "devalued" and "reversed" his vote,[2] thereby denying

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[1] This is the third appearance here of a case involving Georgia's County Unit System. The Court has already declined to review a three-judge District Court case upholding it (*Turman* v. *Duckworth*, 329 U. S. 675) and affirmed in *South* v. *Peters*, 339 U. S. 226, the denial of a petition to enjoin its operation.

[2] Appellant contended that no part of the county unit vote of Cherokee County was counted for candidate Thompson, although Thompson got 1537 votes in that county, the claim apparently being that Thompson should have been given a portion of the county unit vote of each county in which Talmadge got a plurality of the popular vote in proportion to the number of votes received by Thompson in that county. The contention apparently overlooks the fact that a method of counting which would entitle Thompson to a part of the county unit vote of each Talmadge county would also entitle Talmadge to a portion of the county unit vote of each Thompson county, and would have arrived at exactly the result declared by the defendants, because Talmadge carried the popular vote as well as the county unit vote. The complaint also wholly fails to undertake to show how Thompson's failure to win the nomination for Governor could

to him equal protection of the laws, his right to vote as protected by the Fifteenth Amendment,[3] and denying and abridging certain privileges he claims under the Constitution and laws of Georgia.

The complaint attacks a State law of 1917 [4] relating to party primary elections, known as the Neill Primary Law. Its history and operation are set forth in detail in *South* v. *Peters*, 89 Fed. Supp. 672, affirmed by this Court in *South* v. *Peters*, 339 U. S. 226.

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have resulted in damage to appellant. The complaint is at least unusual. Appellant voted in the primary with what must have been full knowledge that the county unit system, in vogue in Georgia since the first statewide primary of 1898, and followed in convention nominations from the very earliest days of the State's history (*South* v. *Peters*, 89 Fed. Supp. 672) would determine the result. He seeks to recover now because the very rule under which he voted was followed.

[3] This contention is based upon the theory that the county unit system favors counties having heavy Negro populations, and the complainant says there is some sort of "conspiracy" on the part of the defendants and unnamed "individuals" to bring about that result. Apparently the argument, exactly the reverse of that advanced in *South* v. *Peters*, *supra*, is that a system which does not operate to discriminate against Negro voters necessarily invades the right of suffrage of white voters.

[4] The gist of the law is that if any political party shall decide to hold a party primary to nominate candidates for State-wide elections the candidate receiving the greatest number of votes in any county shall be deemed to have carried that county and shall be entitled to the "unit" vote of such county in determining the nominee of the party. The "unit" vote is related to the constitutional representation in the lower House of the General Assembly, each county having two unit votes for each such representative. The eight largest counties each have three representatives, the thirty next largest have two each, and the remaining counties have one each. Reapportionment on the basis of population is made after each United States census. To be nominated for Governor or United States Senator a candidate must receive a majority of the county unit votes. Provision is made for a "run-off" election in certain cases, and for the popular vote nominating in case of a tie in "unit" votes.

(The complaint does not allege that the rules adopted by the State Democratic Executive Committee to govern the 1950 primary provided that the primary should be held under the Neill Primary Act. As a matter of fact, the rules simply provided that the County Unit System, not as set forth by law, but as set forth by the rules, should be followed in determining the result of the primary. There was no reference to the statute.)

The Neill Primary Act applies to all parties alike. It does not require any political party to hold a primary. It simply provides that if a party decides to hold a primary the provisions of the statute shall become applicable. The primary law was enacted in 1917 and has governed all party elections since that time.[5] It substantially adopted party primary rules and practices which had governed party primary elections since the first statewide primary was held in 1898. The principle of the County Unit System has prevailed in party conventions since the earliest days of party politics in the State.[6]

The trial court dismissed appellant's complaint, and this ruling was affirmed by the Supreme Court of Georgia. (*Cox* v. *Peters*, 208 Ga. 498, 67 S. E. 2d, 579) The appeal seeks to have this Court review that decision.

Statement of Grounds of Motion

1. *The record fails to present a substantial Federal question.*

A. Appellees contend that no substantial Federal question is involved, because the right of appellant to vote in a State primary election for the nomination of a party candidate for Governor of Georgia does not arise under the Constitution and laws of the United States. The Supreme Court of Georgia so decides in its opinion below and bases its

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[5] The people of Georgia adopted in 1945, by popular vote, a new Constitution which provided anew for apportioning representation in the lower House of the General Assembly on the same basis as had been provided by the Constitution of 1877, in the knowledge that such representation constituted the method whereby "county unit" votes had been distributed among the various counties for primary elections by party practice and the Act of 1917.

[6] See *South* v. *Peters*, 89 Fed. Supp. 672, 677; *Turman* v. *Duckworth*, 68 Fed. Supp. 744.

ruling upon the following cases, which, we believe, support the contention just stated:

Minor v. *Happersett*, 21 Wall. 162, 88 U. S. 162, 22 L. ed. 627;
Ex Parte Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274;
McPherson v. *Blacker*, 146 U. S. 1, 13 S. Ct. 3, 36 L. ed. 869;
Guinn v. *United States*, 238 U. S. 347, 35 S. Ct. 926, 59 L. ed. 1340;
Breedlove v. *Suttles*, 302 U. S. 277, 58 S. Ct. 205, 82 L. ed. 252;
Snowden v. *Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. ed. 497.

Other cases which we believe support this contention are:

United States v. *Cruikshank*, 92 U. S. 542;
United States v. *Reese*, 92 U. S. 214;
Pope v. *Williams*, 193 U. S. 621.

It is not contended that the Fifteenth and Nineteenth Amendments do not forbid denial of the right to *vote* on account of race, color or previous condition of servitude, or on account of sex. It is contended, however, that the right of suffrage, as respects State officers, is derived from the State, subject only to valid Federal restraints upon the State. For instance, the right to vote is deemed in a sense to be conferred upon Negroes by the Fifteenth Amendment, *proprio vigore*, "in any State which may by its laws confine that right to white persons." *Ex Parte Yarbrough*, 110 U.S. 651, 34 L. ed. 567. Appellant was not denied the right to vote in the primary. He did vote, and he does not claim that he has suffered damages by reason

of the denial of any such right. He claims that the method whereby the result of the primary was determined has resulted in damage to him and that the operation of this method in some manner offends the Fourteenth Amendment.

There is, however, no provision of the Federal Constitution or of any Federal statute which "forbids that a State may, in an election affecting the whole State, or a portion thereof, subdivide the territory affected into smaller units, to-wit, counties, for the purpose of taking the vote and ascertaining the result, the sub-divisions having materially different populations." *South* v. *Peters*, 89 Fed. Supp. 672.

We believe the contention just stated is fully sustained by:

Wood v. *Broom*, 287 U. S. 1, 53 S. Ct. 1;
Colegrove v. *Green*, 328 U. S. 549;
Colegrove v. *Barrett*, 330 U. S. 804, 67 S. Ct. 973, and
MacDougall v. *Green*,[7] 335 U. S. 281, 69 S. Ct. 1, 93 L. ed. 1.

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[7] In *MacDougall* v. *Green*, the Court said:

"It is allowable State policy to require that candidates for statewide office should have support not limited to a concentrated locality. This is not a unique policy. See New York Laws 1896, c. 909, § 57, now N. Y. Elec. Laws, § 137(4); 113 Laws of Ohio, 349, Gen. Code § 4785-91 (1929), now Ohio Code Anno. (Cum. Supp. 1947) § 4785-91; Mass. Acts, 1943, C. 334, § 2, now Mass. Anno. Laws, c. 53, § 6 (1945). To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States. Colegrove v. Green, 328 U. S. 549, 90 L. ed. 1432, 66 S. Ct. 1198; Colegrove v. Barrett, 330 U.S. 804, 91 L. ed. 1262, 67 S. Ct. 973."

B. Appellant voted in the primary. His complaint shows that the result of the primary was the same whether ascertained by apportioning county unit votes among the various counties as provided by the rules and the statute, or by dividing the county unit votes of each county on the basis of the popular vote in the county or by merely counting the popular votes.

Appellees contend that it is apparent that the acts complained of could not have invaded any substantial right of appellant, and that the facts do not show such injury to him as to bring him within the class as to whom the act attacked is alleged to be unconstitutional, or that the alleged unconstitutional features of the law injure him, or so operate as to deprive him of rights protected by the Federal Constitution. Consequently appellees contend that appellant here has no standing to raise the questions he seeks to present, since his position is necessarily based upon the abstract idea that the bare fact of the existence of Georgia's county unit statute operates to injure him.

Cases which appellees believe sustain this contention are as follows:

Southern Ry. Co. v. *King*, 217 U. S. 524;
Standard Stock Food Co. v. *Wright*, 225 U. S. 540;
Miles v. *Treasury Department of Indiana*, 298 U. S. 640;
Tileston v. *Ullman*, 318 U. S. 44.

The fact that the complaint embodies a prayer for declaratory judgment does not better appellant's position, since the complaint sets forth no actual interference with the rights of appellant, but at most raises a mere hypothetical or abstract issue.[8].

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[8] In the court below counsel for appellant stated in their brief that "essentially all of the different constitutional violations alleged are aimed at one

Cases believed to sustain this contention are:

Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450, 89 L. Ed. 1725, and cases cited;
Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293, 299, 300, 87 L. Ed. 1407;
Colegrove v. *Green, supra.*

2. *This Court Is Bound by the Decision of the Supreme Court of Georgia in so Far as it Interprets the Constitution and Laws of the State*

Appellees contend that the controlling question, as stated and decided by the Supreme Court of Georgia, is one of State law and that the decision of the Supreme Court of Georgia on these questions is conclusive here.

It will be noted from an examination of the opinion below that appellant assailed the Neill Primary Act because he contended that it violated various provisions of the Constitution of Georgia and deprived him of various rights arising under the Constitution and laws of the State, including rights relating to "elections."

The Supreme Court of Georgia decided these contentions against appellant, holding that the right to vote in a primary does not arise under the Constitution and laws of Georgia.[9]

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point—to invalidate the county unit statute and, therefore, the county unit system . . ." See opinion of the Supreme Court of Georgia. It is thus apparent that the purpose of the suit was not to recover damages but to obtain a declaration upon the validity of the law in a purely hypothetical case.

[9] The controlling question is stated in the opinion of the Supreme Court as follows:

"It is thus apparent that the main and controlling question in this case is whether or not the provisions of the Constitution of the State of Georgia, set out in the foregoing statement of facts, and the provisions of (Georgia) Code §§79-205 and 79-206 have application to a

This decision of the Supreme Court of Georgia so construing the Constitution and laws of the State is not subject to review here. The cases which we believe sustain this contention are:

Watson v. *Buck*, 313 U. S. 387;
Jones v. *Prairie Oil and Gas Co.*, 273 U. S. 195;
Hancock v. *City of Muscogee*, 250 U. S. 454;
Des Moines National Bank v. *Fairweather*, 263 U. S. 103;
Louisiana v. *Resweber*, 329 U. S. 459;
International Union v. *O'Brien*, 339 U. S. 454.

The Court does not, as assumed by appellant in his assignments of error, hold that in Georgia the primary is "by law an integral part of the machinery" of the final election. On the contrary, the Court holds that a primary election is not an integral part of the election machinery, under the Constitution of Georgia of 1945, and a Democratic nomination is not the equivalent of election in Georgia. Such construction by the Supreme Court of Georgia of the Constitution and laws of the State, under the cases just referred to, is likewise, appellees contend, controlling here.

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party primary in Georgia held for the purpose of nominating candidates of that party to run in the general election."

What the Supreme Court of Georgia actually held is set forth in its conclusion as follows:

"We hold that when a political party in Georgia voluntarily elects to exercise the option of holding a primary for the nomination of party candidates under the provisions of Code Section 34-2312, such primary is not an *'election'* within the meaning of that term as used in the constitutional provisions and Code sections relied on by the plaintiff, and that the trial court did not err in sustaining the defendants' demurrer and dismissing the petition and the amendment thereto."

3. *The Questions Presented Here Have Already Been Presented and Reviewed by This Court*

Appellees contend that even if it could be said that the record here presents a substantial Federal question proper for consideration by this Court, the questions involved in the attack sought to be made upon Georgia's County Unit System have already been adequately reviewed and settled by this Court.

The following cases presented the same questions that are here asked—aimed at the same statute, and at least one of them involved the same parties defendant: *Turman* v. *Duckworth*, 68 Fed. Supp. 744, was decided by a three-judge court in the Northern District of Georgia and appeal denied by this Court in *Turman* v. *Duckworth*, 329 U. S. 675.

Cook v. *Fortson*, a companion case, was decided by a three-judge court in the Northern District, 68 Fed. Supp. 624, and appeal denied by this Court in 329 U. S. 675.

South v. *Peters*, a suit for injunction against the defendants here sued for damages, was decided by a three-judge court in the Northern District of Georgia, and reported at 89 Fed. Supp. 672. That decision was affirmed by this Court in *South* v. *Peters*, 339 U. S. 226.

Appellant's suit contends that the defendants, by applying the county unit system as embodied in the Georgia statute, invaded certain rights of the appellant arising under the Constitution and laws of Georgia. As to the questions thus made appellees contend that the decision of the Supreme Court of Georgia is final.

Appellant also contended that the application of the county unit system operated to invade certain rights of appellant arising under the Constitution and laws of the United States. All of the issues thus sought to be made are settled by the decisions of this Court hereinbefore cited, particularly in *MacDougall* v. *Green*, 335 U. S. 281.

WHEREFORE, appellees respectfully submit this statement showing that the questions which this Court is asked to decide are so unsubstantial as not to need further argument or further consideration of this Court, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Supreme Court of Georgia.

This 5th day of January, 1952.

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FILED
JAN 16 1952
CHARLES ELMORE CRO

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 540

W. M. COX,

Appellant,

vs.

JAMES S. PETERS AND MRS. IRIS BLITCH

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

APPELLANT'S BRIEF IN REPLY TO MOTION TO DISMISS OR AFFIRM

MORRIS ABRAM,
W. S. ALLEN,
HAMILTON DOUGLAS, JR.,
MYER GOLDBERG,
JOHN E. GRIFFIN,
C. BAXTER JONES, JR.,
JAMES A. MACKAY,
DAVID L. MINCEY,
RAYMOND M. REED,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 540

W. M. COX,

Appellant,

vs.

JAMES S. PETERS AND MRS. IRIS BLITCH

Appellees.

APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF IN REPLY TO MOTION TO DISMISS OR AFFIRM—SUGGESTION OF SUMMARY REVERSAL

Pursuant to Rule 7 (3) and Rule 12 (3) of the Supreme Court of the United States, appellant files this reply to appellees' Motion to Dismiss or Affirm.

Apparently, appellees have moved for summary dismissal on two grounds. We state those grounds, and why we believe they have no merit, as follows:

(1) They contend that no federal question is presented because the right to vote in a state election arises only under state law. But the right to equal protection and the immunity from racial discrimination in connection with that right arise under federal law.

(2) They contend that no federal question is presented because the Supreme Court of Georgia has conclusively in-

terpreted its State Constitution as *vesting* the right to vote *de jure* only with respect to an actual election. But this Court is not concluded on the federal question whether state action has violated the Federal Constitution and the federal civil rights statute by *divesting* part or all of the right to vote *de facto* from plaintiff and others by means of a statute affirmatively requiring discrimination in an integral part of such election.

Apparently, appellees have moved for summary affirmance on three grounds. We state those grounds, and why we believe they have no merit, as follows:

(1) They contend that plaintiff suffered no injury because the result of the election would have been the same if he had been allowed to cast a full ballot and to have it properly counted. But this suit for damages complains of injury to plaintiff's individual right to vote without regard to the results of the election. Appellees' arguments would overrule all of the federal primary cases awarding damages for injury to the right to vote because the result was not shown to be different in any of them.

(2) They contend that a state may classify. But the classification may not be arbitrary or discriminatory. In this case the question as to the nature of the classification remains for decision.

(3) They contend that this Court has already decided the questions here presented, adversely to appellant. Not so. This Court has certainly *never* decided that the Federal Constitution affords no protection of any kind to state primaries; it has frequently decided exactly to the contrary. Furthermore, appellant's Statement as to Jurisdiction has already anticipated and distinguished on several grounds the cases cited in appellees' motion as having settled the questions here presented, to wit, *Turman* v. *Duckworth*,

329 U. S. 675; *South* v. *Peters*, 339 U. S. 226; *MacDougall* v. *Green*, 335 U. S. 281.

We do not understand that the Rules of this Court contemplate a formal motion for summary reversal. However, inasmuch as appellees have sought summary action dismissing or affirming, we do make an informal suggestion of summary reversal for the following three reasons:

(1) The Supreme Court of Georgia ruled on the sole question whether Georgia statutes regulating primaries are *unrelated* to the Fourteenth and Fifteenth Amendments to the Federal Constitution. The error on this point is so plain and palpable that argument and brief are unnecessary. It would seem both desirable and economical for this Court to state merely that the Georgia Democratic Primary is integrated both in law and in fact into the Georgia election process, that Georgia action relating to such primary may not abridge the right to equal protection or the immunity from racial discrimination secured by the Fourteenth and Fifteenth Amendments to the Federal Constitution, and that the case is reversed and remanded for action consistent with *Nixon* v. *Herndon*, 273 U. S. 539; *Nixon* v. *Condon*, 286 U. S. 73; *U. S.* v. *Classic*, 313 U. S. 299; *Smith* v. *Allwright*, 321 U. S. 649; *Chapman et al.* v. *King*, 154 F. 2d 460, 464; *cert. den.* 327 U. S. 800, and *Rice* v. *Elmore*, 165 F. 2d 387; *cert. den.* 333 U. S. 875.

(2) Assuming that Georgia statutes regulating primaries *are related* to the Fourteenth and Fifteenth Amendments to the Federal Constitution, the Supreme Court of Georgia did *not* rule on the question whether the relation between this particular statute and those amendments is one of *conflict*. It may very well be that the Supreme Court of Georgia would rule that there is such a conflict; this is indicated by the fact that the Supreme Court of Georgia put its decision on what it called the "main and control-

ling point" that the Georgia Democratic Primary and the Federal Constitution have no relation, and did *not* put its decision on the secondary point that such relation would in any event be compatible. It would seem both undesirable and unnecessary for this Court to consider possible error, unless and until the Supreme Court of Georgia shall make actual error, on that secondary point.

(3) During the preparation of this reply, it was announced that the Georgia Democratic Primary during 1952 will be held on a very early date, to wit, May 14. Summary action by this Court, and thereafter by the Supreme Court of Georgia which has already considered brief and argument on *all* points in the case, would enable election officials to know the applicable law in advance. We do not submit this reason as being especially important to the deliberations of this Court, but merely as cumulative to the other reasons given above for summary reversal.

While we do not abandon any of our assignments of error, we nevertheless submit that in the present posture of this case a summary reversal is justified, if under the practice of this Court it is possible.

Respectfully submitted,

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W. S. ALLEN,
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JOHN E. GRIFFIN,
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Counsel for Appellant.

FILED
MAR 17 1952
CHARLES ELMORE CROPL
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Supreme Court of the United States

OCTOBER TERM, 1951

No. 540

W. M. COX,

Appellant,

vs.

JAMES S. PETERS AND MRS. IRIS BLITCH

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR RE-HEARING

MORRIS ABRAM,
W. S. ALLEN,
HAMILTON DOUGLAS, JR.,
MYER GOLDBERG,
JOHN E. GRIFFIN,
C. BAXTER JONES, JR.,
JAMES A. MACKAY,
DAVID L. MINCEY,
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Counsel for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1951

No. 540

W. M. COX,

Appellant,

vs.

JAMES S. PETERS AND MRS. IRIS BLITCH

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR RE-HEARING

We beg and beseech the majority of this court to grant re-hearing and to reverse the Supreme Court of Georgia in *one* particular only: that court ruled that the fourteenth and fifteenth amendments do *not* protect primaries to nominate state officials; this court should rule emphatically that the fourteenth and fifteenth amendments *do* protect primaries to nominate state officials.

You do not need to say one word about the Georgia county unit system; if you will simply declare that all Georgia primary laws *must* conform to the federal constitution, the state court can then decide, for the first time,

whether the Georgia county unit system *does* conform to the federal constitution.

We respectfully suggest that the majority of this court, though not intending to do so, have delivered a deadly blow at the vitals of the very constitution they are sworn to uphold. To the people of Georgia, your unelaborated dismissal says coldly, "Do not look to the federal constitution for 'equal protection' because it does not give you *any protection at all.*"

We came to this court on appeal from a ruling of the Supreme Court of Georgia which flaunted the federal constitution in the most direct way imaginable, namely by holding that said constitution affords no protection whatever to voters in the Democratic primary to nominate a candidate for governor. The *only question* considered by the state court was whether the federal constitution affords protection of any kind. Despite the obvious substance of that question, and despite the fact that the Supreme Court of Georgia rested its opinion solely on the answer to that question, this court disposed of the whole, vital controversy in a single sentence by saying, "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

Frankly, we do not know what your one-sentence opinion means. The long line of federal primary cases, we had thought, made it clear that the fourteenth and fifteenth amendments to the federal constitution protect primaries held to nominate *both federal and state officials.* But in the case at bar, the majority stated without elaboration that no "substantial federal question" is involved in the ruling of the Supreme Court of Georgia that the fourteenth and fifteenth amendments did *not* protect a Georgia primary held to nominate a *state* official. Does your opinion mean, then, that the fourteenth and fifteenth amendments

do *not* protect primaries held merely to nominate *state* officials? That is certainly a position which opposing counsel took in their motion to dismiss. That is quite likely the position which legislatures and political parties throughout the land will take in their future legislation and regulation.

We invite the majority of this court to consider the monstrous consequences of such a development. While taking great pains to be circumspect as to federal officials, legislatures and political parties can and will set up different rules for nominating state officials; and in some states those rules will surely exclude Negroes as well as various other classes. This court would then be deluged with suits involving both simple and sophisticated schemes to disfranchise persons because of color and other irrelevant factors, *within the restricted realm of nominating state officials.* In such suits the defendants would say, and would repeat again and again, "But there is no substantial federal question here; don't you remember Cox vs. Peters?"

After much conflict and misunderstanding, we conceive that this court would find it imperative to say, "But in Cox vs. Peters we did not mean to say that the federal constitution affords no protection to primaries to nominate state officials."

If that is not your meaning, please say so now! We urge this court to grant re-hearing, and to reverse on the sole point that the federal constitution *does* protect *all* Georgia primaries. Such a ruling will save us all, legislature and party and citizen and counsel and court, untold inconvenience and confusion; it will also prevent much discrimination that will almost certainly otherwise occur.

We have said that this court need not decide the validity of the county unit system, or of any other system of apportionment, on this appeal. We repeat and emphasize that point! We simply urge that this court declare that the

county unit system *must* conform to the federal constitution; the state can and will thereupon decide whether the system *does* conform to the federal constitution.

Nevertheless, in order to place the importance of this case in perspective, and in order to make clear how ultimately the decision of this court has frustrated hundreds of thousands of Georgia citizens, we ask the majority of this court to reflect seriously on just what has been done by this opinion.

Here are the people of a great state who have twice in recent years shown their true feelings about the "county unit system": once in 1946 when Carmichael received by far the most popular votes for the Democratic nomination for governor, but *lost* the nomination on a county unit basis; again in 1950 when the people voted approximately 165,000 to 135,000 *against* extending the unit system to the state constitution (they beat the amendment without counting a single vote in Fulton County, largest in Georgia). The people do not like the system. But what can they do about it?

It is all very well to say, "Let the people vote repeal"; but "the people" cannot vote to repeal, or even to readjust, the system. *There is no way on earth by which the majority of the people of Georgia can ever get a chance to say whether they wish to readjust or repeal the county unit system.* The people can speak only through their political machinery, and every single part and parcel of that machinery is infected with the county unit system!

The machinery of legislation is not available, because the legislature that would enact a bill is apportioned on the same basis as the county unit system (and the governor who would review the bill is always elected after being nominated under the county unit system).

The machinery of constitutional amendment is not available, because only the legislature can propose such an amendment, and the legislature is apportioned on the same

basis as the county unit system. The legislature may let the people say whether they wish to extend, but never to readjust or repeal, the system.

This is literally a case where hundreds of thousands of citizens have no hope except from their courts. The people have long placed great confidence in their courts; and the courts have justified this confidence time and again by rising above the narrow confines of petty procedural technicalities, and by declaring anew with passion and sincerity the great first principles of human rights in a democracy. We submit, however, that a one-sentence, unelaborated, unqualified dismissal, in the cold terms of that in the case at bar, falls far short of the great decisions by which *this* court has heretofore justified the people in their hope and confidence.

Hundreds of thousands of Georgia citizens are in political chains; there are only two keys, one held by their jailers, and the other by their courts. Law clerks might say, with petty sophistication, "Let the people persuade their *jailers* to release them; this court will wash its hands of the controversy." Pontius Pilate said something very similar two millenia ago. We urge that great judges on a great court would have done and will do otherwise.

Respectfully submitted,

Morris Abram,
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Myer Goldberg,
John E. Griffin,
C. Baxter Jones, Jr.,
James A. Mackay,
David L. Mincey,
Raymond M. Reed,
Counsel for Appellant.

CERTIFICATE OF COUNSEL

I do hereby certify that I am of counsel for the appellant in the within and foregoing petition for re-hearing, and that it is presented in good faith and not for delay.

C. Baxter Jones, Jr.
Of Counsel for Appellant

ACKNOWLEDGMENT OF SERVICE

On behalf of appellees, James S. Peters and Mrs. Iris Blitch, acknowledgment is hereby made of service and receipt of a copy of the within and foregoing petition for re-hearing.

This 14th day of March, 1952.

B. D. Murphy,
Of Counsel for Appellees,
James S. Peters and Mrs. Iris Blitch.

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 540

W. M. COX

v.

JAMES E. PETERS AND MRS. IRIS BLITCH

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING

The United States joins appellant in requesting reconsideration of the Court's order of March 3, 1952, dismissing the appeal for want of a substantial federal question. The Government is concerned (a) that the Supreme Court of Georgia has made a patently erroneous ruling upon a question of federal law of general importance, namely, that the protections of the Fourteenth and Fifteenth Amendments of the Federal Constitution do not extend to the right of citizens of the United States to vote in a primary for the nomination of state officials; (b) that, resting its decision solely on that ground, the state court did

not reach and decide the merits of appellant's claim that the so-called county unit voting system violates rights secured to him by the Fourteenth and Fifteenth Amendments; and (c) that this Court's dismissal of the appeal leaves undisturbed the erroneous ruling of the Supreme Court of Georgia on the only federal question decided by it, and has the unfortunate and plainly unintended effect of preventing appellant from urging on remand that his federal constitutional claim, although non-justiciable and non-reviewable in federal courts because political questions are involved, may nevertheless be entertained and adjudicated in the courts of the state of Georgia.

Appellant in this case sought to obtain from the state courts of Georgia a determination that the county unit voting system, as applied to a primary for the nomination of a candidate for the office of Governor of the state, violates the Fourteenth and Fifteenth Amendments. The jurisdiction of the state courts of Georgia, unlike federal courts, is neither ousted nor impaired because political questions are involved. *Thompson* v. *Talmadge*, 201 Ga. 867. Hence, had the state courts given judgment in vindication of appellant's asserted constitutional claim, there would have been no conflict with the rule applied by this Court in *South* v. *Peters*, 339 U. S. 276, 277, and cases there cited, that such a claim raises questions which are essentially political in nature and

hence not justiciable by federal courts under Article III of the Constitution of the United States.

The broad considerations of policy underlying the "political questions" rule applied in the federal courts were stated in the opinion of Mr. Justice Frankfurter (in which Mr. Justice Reed and Mr. Justice Burton concurred) in *Colegrove* v. *Green*, 328 U. S. 549, a suit in a federal district court to restrain state officers from enforcing a state election law which allegedly involved inequities and discriminations offensive to the federal Constitution. Such a suit, the opinion pointed out (p. 553), "concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof."

On the other hand, state courts in enforcing rights derived from federal law are not bound, as a general proposition, by jurisdictional or procedural limitations applicable to similar proceedings in federal courts. *Minneapolis & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211; *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142; cf. *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230. Accordingly, a state may be free to vest its courts with authority to entertain and adjudicate claims under the Fourteenth and Fifteenth Amendments involving questions of a political nature which could not, under the rule applied

in *South* v. *Peters*, *supra*, be decided or reviewed by federal courts.[1] A state court could thus prop-

[1] A state court should have no less authority to decide federal questions of a nonjusticiable political nature than to render equally nonreviewable advisory opinions on federal questions of a justiciable nonpolitical nature. In *Doremus* v. *Board of Education*, decided March 3, 1952, the Court said (slip opinion, p. 5): "We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." The Court in the *Doremus* case did not vacate the judgment of the Supreme Court of New Jersey holding that the statute involved did not violate the federal Constitution; it merely dismissed the appeal. Consequently, that state court judgment, though not reviewable by this Court, establishes the law for New Jersey as to the application of the Fourteenth Amendment to the subject-matter of the controversy.

Cf. *Chandler* v. *Wise*, 307 U. S. 474, in which the Kentucky Court of Appeals had held that the resolution of the state legislature purporting to ratify the proposed Chief Labor Amendment was void. This Court held that after the Governor of the state forwarded the certification of the ratification of the amendment to the Secretary of State of the United States, "there was no longer a controversy susceptible of judicial determination." However, the Court ordered, not that the judgment of the state court be reversed for lack of jurisdiction, but that the writ of certiorari be dismissed. It expressly stated (p. 477) that "the state court had jurisdiction *in limine* * * *." Mr. Justice Black and Mr. Justice Douglas concurred separately in the dismissal of the writ, stating that they did "not believe that state or federal courts have any jurisdiction to interfere with the amending process." See also *Pacific Telephone Co.* v. *Oregon*, 223 U. S.

erly undertake to pass on the merits of federal constitutional claims such as appellant's, even

118, where a state court rejected on the merits a claim that a state law was in conflict with the "republican form of government" provision of the federal Constitution. In holding this claim nonjusticiable, this Court dismissed the writ of error for want of federal jurisdiction. It did not hold that there was a similar lack of jurisdiction in the state court.

Coleman v. *Miller*, 307 U. S. 433, also involved an attack on the validity of the process whereby the state of Kansas ratified the proposed Child Labor Amendment. The state supreme court entertained the suit but dismissed it on the merits. This Court, holding (p. 454) that the questions raised by the suit "are essentially political and not justiciable" and could be decided only by Congress, affirmed the judgment of the state court on that ground. There was no suggestion in the Court's opinion that the suit was improperly entertained by the state court. The separate opinion of Mr. Justice Frankfurter (concurred in by Justices Roberts, Black and Douglas), urging that the writ of certiorari be dismissed because petitioners, whatever their remedies might be in the state courts under state law, had no standing in this Court since the issues were political, stated (p. 462): "To whom and for what causes the courts of Kansas are open are matters for Kansas to determine. But Kansas can not define the contours of the authority of the federal courts, and more particularly of this Court." See also *Columbus & Greenville Ry.* v. *Miller*, 283 U. S. 96, 99, and cases there cited, holding that the question of standing "to assail in the courts of the State the constitutional validity of a state statute is a local question * * *."

Even if it be held that some provisions of the federal Constitution by their very nature can be enforced only by Congress or the President, and that no court, federal or state, has jurisdiction to enforce them, this should not apply to claims like appellant's which are derived from the Fourteenth and Fifteenth Amendments.

though a federal court could not. And it is this question which the Supreme Court of Georgia, in the view it took of the case, did not reach, and, we fear, cannot reach if this Court's order dismissing the appeal remains unmodified. It is respectfully suggested that the Court's order in its present form precludes appellant from tendering to the Supreme Court of Georgia this issue which only that court can finally decide, namely, whether under Georgia law the state courts can and should take jurisdiction to determine the validity under the federal Constitution of the county-unit system as applied to a primary to nominate a candidate for Governor.

The Supreme Court of Georgia did not reach that question because it chose to rest its decision solely on the ground that such a state primary is not entitled to the same constitutional protection as a state election—a ruling of federal law which is plainly at variance with the decisions of this Court in *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *United States* v. *Classic*, 313 U. S. 299; and *Smith* v. *Allwright*, 321 U. S. 649. We do not construe the Court's dismissal of the appeal as implicitly approving this ground of the state court's decision. Fearing, however, that the order may in some quarters be interpreted as conveying such an implication, appellant in his petition for rehearing justifiably urges the Court to remove any doubts which may inadvertently

have been cast upon the authority of the line of cases cited above.

Since the order was not accompanied by a statement of the reasons therefor or a citation of supporting authorities, speculation as to the grounds for the Court's action cannot be avoided. It would appear, however, that the dismissal of the appeal rests upon an application of the rule applied in *South* v. *Peters, supra,* as to the non-justiciable character, so far as federal courts are concerned, of the political questions involved in the suit. Ordinarily, of course, the Court limits its review solely to a consideration of the precise federal question decided by the state court. *Whitney* v. *California,* 274 U. S. 357, 362–363; *Dewey* v. *Des Moines,* 173 U. S. 193, 197–198; see Note, *Supreme Court Review of State Court Decisions Involving Multiple Questions,* 95 U. of Pa. L. Rev. 764. And where a state court decision is based on an erroneous federal gound, its judgment will be vacated and the cause remanded, notwithstanding that the state court might have based its decision on another ground, not considered and decided by it, which would have been adequate to support the judgment. Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.), pp. 155–158, 169–170.

In this case, however, presumably because a similar controversy had been here two terms ago in *South* v. *Peters, supra,* the Court apparently

pretermitted the immediate question decided by the Supreme Court of Georgia and went directly to what it deemed the ultimate issue in the case, namely, the merits of the claim of violation of federal constitutional rights. If we are correct in inferring that the Court decided only that such a claim raises political questions which are not justiciable in this Court or any federal court, it would not follow that appellant should be denied the opportunity of arguing to the Supreme Court of Georgia that even though the questions raised are non-justiciable for purposes of federal review, they should nevertheless be considered and decided by a state court whose jurisdiction of a constitutional controversy is not defeated because the issues are political in nature. *Thompson* v. *Talmadge, supra.*

Accordingly, if the Supreme Court of Georgia erred, as we believe, in holding that the Fourteenth and Fifteenth Amendments afford no protection whatsoever to the right of citizens of the United States to vote in a state primary, then, instead of dismissing the appeal—thus leaving the erroneous ruling below as an insuperable barrier against reaching other questions—it would, we submit, be entirely proper and in the public interest for this Court to vacate the judgment below and remand the case so that appellant could seek determination by the Supreme Court of Georgia of the question whether that court, notwithstanding that the case may involve political issues

which are not justiciable in federal courts, should pass upon the validity of the county unit voting system under the Fourteenth and Fifteenth Amendments.

The importance of affording appellant an opportunity to present this question to the Supreme Court of Georgia is clear and substantial. The record warrants no inference that denial of such an opportunity results only in remote or conjectural prejudice to appellant and to others who seek from the state courts, and not from this Court, correction of what they deem so gross an inequality in voting rights as to constitute a discrimination prohibited by the Constitution of the United States.

For the reasons stated, we urge this Court to reconsider its dismissal of the appeal, to vacate the judgment below as resting on an erroneous federal ground, and to remand the case to the Supreme Court of Georgia for consideration of such further questions as may be involved.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

PHILIP ELMAN,
Special Assistant to the Attorney General.

MARCH 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1952

2d 527.

No. 540. Cox *v.* PETERS ET AL. Appeal from the Supreme Court of Georgia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted. *W. S. Allen, Hamilton Douglas, Jr., C. Baxter Jones, Jr.* and *David L. Mincey* for appellant. *Eugene Cook*, Attorney General of Georgia, *M. H. Blackshear, Jr.*, Deputy Assistant Attorney

General, *B. D. Murphy, Edward E. Dorsey* and *M. F. Goldstein* for appellees. Reported below: 208 Ga. 498, 67 S. E. 2d 579.